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No. 09-

IN THE

Supreme Court of the United States

TEAMSTERS, LOCAL UNION NO. 523, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and KIRK RAMMAGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the National Labor Relations Board have authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that "three members of the Board shall, at all times, constitute a quorum of the Board"?

2. May a union be held to commit an unfair labor practice under 29 U.S.C. § 158(b)(1)(A) and (2) by preferring the bargaining unit members it has a duty to represent over persons for which it has no such duty?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The caption contains the list of all parties appearing here and before the United States Court of Appeals for the Tenth Circuit. Interstate Bakeries Corporation a party before the NLRB has no interest in this petition. Pursuant to Rule 29.6, Petitioner states that it is an association of individuals and has no corporate members. No publicly traded or privately held company owns 10% or more of Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Teamsters Local Union No. 523, affiliated with the International Brotherhood of Teamsters, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in *Teamsters Local Union No. 523 v. NLRB*, Nos. 08-9568, 08-9577.[1]

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. A) is published at 590 F.3d 849 (10th Cir. 2009).

JURISDICTION

The Court of Appeals filed its opinion on December 22, 2009, and denied the petition for rehearing and rehearing *en banc* on February 16, 2010. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* The pertinent provisions are reproduced below.

> The Board is authorized to delegate to any group of three or more members any or all of

[1] Case No. 08-9568 is Petitioner's petition for review of the NLRB decision. Case No. 08-9577 is the NLRB's petition for enforcement of its orders in this same underlying NLRB decision.

the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the provisions hereof. 29 U.S.C. § 153(b).

(a) It shall be an unfair labor practice for an employer—

. . . (3) by discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization. . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [29 U.S.C. § 157];

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3). . . . 28 U.S.C. § 158.

STATEMENT OF THE CASE

This case arises as one of the many of decisions of the NLRB that have been cast into doubt by opposed holdings from the Courts of Appeals on the issue of whether a two-person NLRB has a quorum that can issue decisions. The D.C. Circuit's decision in *Laurel Baye Healthcare of Lake Lanier v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), held that the NLRB was without authority, which is the position of your Petitioner herein. In *New Process Steel, L.P. v. NLRB*, 546 F.3d 840 (7th Cir. 2009), the Seventh Circuit took the opposite view. As to *New Process Steel*, this Court has granted certiorari as Case No. 08-1457; the case has been briefed and argued, and is awaiting decision.

In the event this Court reverses the ruling in *New Process Steel*, then this Court should grant certiorari in this case as well, vacate the decision of the Tenth Circuit, and remand this matter for action in light of that decision.

If this court does not reverse the Seventh Circuit in *New Process Steel*, then Petitioner requests a grant of certiorari for the conflict between the Tenth Circuit decision herein and the First Circuit decision in *NLRB v. Whiting Milk Corporation*, 342 F.2d 8 (1st Cir. 1965), on the Union's duty to help those it does not represent. The underlying facts to this case are set out below.

Interstate Bakeries, the employer, had separate bargaining units for drivers of its Dolly Madison products, on the one hand, and its Hostess and Wonder Bread products, on the other hand, because they had

at one time been brands owned by competing companies. Each of those separate bargaining units was represented by Petitioner herein, Teamsters Local Union No. 523.

Rammage, the intervenor, was an Interstate Bakeries driver in a job not represented by either the Dolly Madison bargaining unit nor the Hostess and Wonder Bread bargaining unit. When Interstate Bakeries wanted to consolidate its driving routes for the Dolly Madison products, on the one hand, with the Hostess and Wonder Bread products, on the other hand, thereby consolidating separate bargaining units, it also wanted to include this third party, Rammage, into the consolidated bargaining unit.

Petitioner was agreeable to consolidation of the two bargaining units and, since it represented both units, agreed to dove-tail[2] unit seniority among the members of the two bargaining units it represented into the combined bargaining unit. Rammage had no unit seniority in either bargaining unit (since he was not a member of either bargaining unit) and he was end-tailed—put at the end of the combined bargaining unit seniority list. For this he filed unfair labor practice (ULP) charges.

The Tenth Circuit ruled that Petitioner committed a ULP by preferring the members of the bargaining units it represented over Rammage, whom it did not represent. Such a decision is directly contrary to the

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[2] That is, each driver would take his unit seniority with him to the combined bargaining unit.

First Circuit decision in *Whiting Milk, supra*, which held that a union's preference of the people it has a duty to represent over those it does not represent is a natural consequence of the fact of representation and is not a ULP.

REASONS FOR GRANTING THE PETITION

PROPOSITION I: The Circuits Are Divided over the Question of a Two Member NLRB and This Court Has Granted Certiorari to Resolve the Issue.

As noted above, the decisions in *Laurel Baye Healthcare of Lake Lanier v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009) and *New Process Steel, L.P. v. NLRB*, 546 F3d 840 (7th Cir. 2009), are in conflict. The former holds that the NLRB was without authority when it acted with only two sitting members; the latter said that the NLRB did have authority. In this case, the Tenth Circuit also held that the NLRB had authority to issue decisions with only two members. Petitioner submits that the correct rule is that of *Laurel Baye*.

Further, this Court has granted certiorari in *New Process Steel*. If this Court reverses the Seventh Circuit's decision in *New Process Steel*, Petitioner requests this court to grant certiorari in this case, vacate the decision of the Tenth Circuit, and remand this matter in light of that new decision.

PROPOSITION II: The Circuits Are Divided over the Question of Whether a Union Commits a ULP by Preferring the Employees It Has a Duty To Represent over Those It Does Not Represent.

The NLRB in *Whiting Milk* ruled that a union commits a ULP by preferring the bargaining unit members it is certified to represent over those for whom it is not so certified. The court of appeals in the First Circuit reversed that decision.

In this case, the NLRB rejected the First Circuit decision in *Whiting Milk, supra,* and rather followed its Board decision in *Whiting Milk.* The Tenth Circuit upheld that position, ruling that a union is liable when it prefers those it is certified to represent over those whom it does not represent. The First and Tenth Circuits are, thus, in conflict, and certiorari is appropriate to resolve the split over the question presented.

PROPOSITION III: The Decision Below Fails to Recognize the Appropriate Duty of the Union to Those It Is Certified to Represent.

In the *Whiting Milk* Board decision, the rule was set up that there was a duty for a union to treat people it represented equally with those it did not represent. Noting the illogic of this position, the Board decision in *Whiting Milk* was overturned by the First Circuit.

This Court has long held that the certified bargaining representative has a duty to represent those it is certified to represent. *Air Line Pilots Association*

v. O'Neill, 499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991); *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Marquez v. Screen Actor's Guild, Inc.*, 525 U.S. 33, 119 S.Ct. 292, 142 L.Ed.2d 242 (1998). Given the duty that the certified bargaining representative has to the bargaining unit members it represents, the question gets back to: can a union be responsible for favoring those it has the duty to represent over those for whom it has no such duty? The statement of the question makes the answer obvious. As stated in *Whiting Milk, supra*, 342 F2d at 11:

> It is simply a case where the Union bargained for benefits for all employees within the units it represented without at the same time bargaining for similar benefits for employees for whom it had no authority to speak. If this be an unfair labor practice, on the same reasoning so also would it be an unfair labor practice for a union to bargain for an increase in wages for employees in a unit it represented without at the same time bargaining for an increase in wages for employees in a similar unit it did not represent.
>
> The long and short of this case is that the Union bargained for and obtained a benefit for employees in the units it represented. This is not an illegal discrimination against employees in other units not represented by the Union, but only a normal and natural incident of union representation.

It may be noted in this connection that neither *Whiting Milk, supra*, nor its holding, were mentioned by the court below, even though that case was the meat of Petitioner's position on appeal of this issue.

CONCLUSION

Petitioner suggests that, if this Court reverses the Seventh Circuit in *New Process Steel*, that this Court grant certiorari herein, vacate the decision of the Tenth Circuit, and remand this matter.

In the event this Court does not reverse the Seventh Circuit in *New Process Steel*, then Petitioner requests this court to grant certiorari on the conflict between the First Circuit and the Tenth Circuit as to the Union's duty in preferring its bargaining unit members over persons it does not represent.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED DECEMBER 22, 2009

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 08-9568, 08-9577

TEAMSTERS LOCAL UNION NO. 523, affiliated with the International Brotherhood of Teamsters,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

KIRK RAMMAGE,

Intervenor.

December 22, 2009, Filed

JUDGES: Before TACHA, HOLLOWAY, and KELLY, Circuit Judges.

OPINION BY: TACHA

Appendix A

OPINION

TACHA, Circuit Judge.

This appeal arises from an unfair labor practice dispute initiated by Kirk Rammage against the Teamsters Local Union No. 523 ("the Union") and Mr. Rammage's employer, Interstate Brands ("the Employer"). After a hearing, the National Labor Relations Board ("NLRB"), acting through its only two members, determined that both the Employer and the Union committed unfair labor practices in violation of 29 U.S.C. § 158. The Union brought this appeal[1] and the NLRB cross-appealed for enforcement of its order. This case poses two questions: (1) whether the NLRB has statutory authority to act with only two members, both of whom were part of a three-member group to which the NLRB delegated all of its authority; and (2) if the NLRB was authorized to act in this case, whether it erred in concluding that the Union committed an unfair labor practice when it insisted that Mr. Rammage lose his seniority for route bidding purposes because of his prior lack of union participation. We have jurisdiction under 29 U.S.C. § 160(e) and (f) and conclude that the NLRB has the authority to act under the present circumstances. Furthermore, we AFFIRM the decision of the NLRB and enter judgment enforcing its order in full.

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1. The Employer did not appeal the NLRB's order.

Appendix A

I. The NLRB's Authority to Act with Two Members

A. Standard of Review

Before we can reach the merits of the unfair labor practice dispute, we must first determine whether 29 U.S.C. § 153(b) authorizes the NLRB to act with only two members under the present circumstances. We apply the familiar *Chevron* rule of deference to an agency's interpretation of its own statutory authority. *See Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1250 (10th Cir. 2004) ("The FTC's conclusion that [statutory] language authorized it to enact the national do-not-call registry is entitled to deference under the familiar test outlined in *Chevron*."); *see also Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 381, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988) (Scalia, J., concurring) ("[I]t is settled law that the [*Chevron*] rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction."); *Commodity Futures Trading Com. v. Schor*, 478 U.S. 833, 844, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986) (citing *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) for the proposition that "considerable weight must be accorded the CFTC's position" regarding its statutory authority to decide state law counterclaims in reparations proceedings). Under *Chevron*, we begin by examining the statute's plain language, giving words their ordinary and natural meaning, to determine if "Congress has directly spoken to the precise question at issue." *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1153

(10th Cir. 2009) (quotations omitted). "If congressional intent is clear from the statutory language, the inquiry is over, and both the court and the agency must give effect to the unambiguously expressed intent of Congress." *Id.* (quotations and internal citations omitted). If, however, the statutory language is silent or ambiguous regarding the precise question at issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* (quotations and internal citations omitted). "A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses." *McGraw v. Barnhart*, 450 F.3d 493, 498 (10th Cir. 2006).

B. Analysis

The National Labor Relations Act ("NLRA") provides, in relevant part:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise . . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. § 153(b).

Appendix A

In December 2007, the NLRB was comprised of four members: Liebman, Schaumber, Kirsanow, and Walsh. On December 28, 2007, in anticipation of the Board's potential paralysis because of the approaching expiration of Kirsanow's and Walsh's terms, the four members delegated all of the Board's authority to Liebman, Schaumber, and Kirsanow pursuant to the first sentence of § 153(b). On December 31, 2007, Kirsanow's and Walsh's terms expired. Their departures left only two members on the Board, Liebman and Schaumber, both of whom were part of the three-member group to which the Board delegated all of its authority. The Board has continued to act with only these two members since that time.

The NLRB's construction of § 153(b) and its belief that it is authorized to act under the present circumstances was derived, in part, from a Memorandum Opinion issued by the Office of Legal Counsel of the U.S. Department of Justice. In that opinion, the Office of Legal Counsel concluded that "[t]he provision for a two-member quorum. . . is an express exception to the requirement that a quorum of the Board shall be three members." Quorum Requirements, 2003 OLC LEXIS 20, 2003 WL 24166831 (Mar. 4, 2003).

We are mindful that we are now the sixth circuit court to examine the NLRB's statutory authority to act with two members under the present circumstances.[2]

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2. We also recognize that the Supreme Court has granted certiorari on this precise issue. *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert granted*, 130 S. Ct. 488, 175 L. Ed. 2d 344 (2009).

The First, Second, Fourth and Seventh Circuits have all upheld the NLRB's construction of § 153(b) which authorizes the agency to act with only two members if both members were part of a three-member group to which the Board validly delegated all of its authority. *See Northeastern Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654, 2009 WL 4016113 (4th Cir. 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009). Although these courts have not followed identical analytical paths, the First, Fourth, and Seventh Circuits all based their decisions on the plain language of § 153(b). *See Northeastern Land Servs.*, 560 F.3d at 41 ("The Board's delegation of its institutional power . . . was lawful under the plain text of [§ 153(b)]."); *Narricot Indus.*, 587 F.3d 654, 2009 WL 4016113, at *3 ("Under the plain and unambiguous text of § 3(b) . . . the designated three-member group was empowered to act with a two-member quorum."); *New Process Steel*, 564 F.3d at 846 ("The plain meaning of [§ 153(b)] thus supports the NLRB's delegation procedure.").

On the other hand, the District of Columbia Circuit has concluded that the NLRB does not have the authority to act with only two members under the present circumstances. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 385 U.S. App. D.C. 354 (D.C. Cir. 2009). Significantly, the D.C. Circuit also based its decision primarily on the plain language of § 153(b), focusing on the phrase "at all times" in the middle of § 153(b)'s three-member quorum provision.

See id. at 473 ("The quorum provision clearly requires that a quorum of the Board is, 'at all times,' three members." (quoting 29 U.S.C. § 153(b)).

We are hard-pressed in the wake of this split of opinion in our respected sister circuits to find that the statutory language is clear on its face. Indeed, this very split "is evidence of [the statute's] ambiguity." *In re So. Star Foods, Inc.*, 144 F.3d 712, 715 (10th Cir. 1998). Accordingly, we proceed to *Chevron's* second step, under which we must uphold the NLRB's interpretation of § 153(b) if that interpretation is permissible. Although § 153(b) states that "three members of the Board shall, at all times, constitute a quorum of the Board," that clause is immediately followed in the same sentence by the words, "except that two members shall constitute a quorum of any group designated pursuant to [§ 153(b)'s] first sentence. . . ." § 153(b). We find that the NLRB's construction of § 153(b), which reads the phrase "except that" as modifying the three member quorum provision, and which is consistent with the First, Fourth, and Seventh Circuits' constructions, is permissible. Therefore, we uphold the NLRB's authority, under § 153(b), to act with only two members, both of whom were part of a three-member group to which the Board validly delegated all of its authority.

Appendix A

II. The Unfair Labor Practice Dispute

A. Factual Background

Having determined that the NLRB has the authority to act with only two members under the present circumstances, we now turn to the merits of the unfair labor practice dispute. The Employer makes and distributes bakery products under several brand names including Dolly Madison, Hostess, and Wonder Bread. Historically, the Employer distributed its Dolly Madison products separately from its Hostess and Wonder Bread products. This meant that some sales representatives exclusively sold and delivered Dolly Madison products while other sales representatives sold and delivered only Hostess and Wonder Bread products. This bifurcated distribution system also produced bifurcated union representation, with the Union representing both the Dolly Madison sales representatives and the Hostess/Wonder Bread representatives in separate bargaining units under separate collective bargaining agreements.

In late 2005, the Employer consolidated its distribution systems so that all of its sales representatives would sell and deliver products under all of its brand names. Pursuant to this consolidation plan, the Employer and the Union agreed that the separate bargaining units would also be consolidated so that the Union could represent all the Employer's sales representatives as one unit under one agreement. The Employer and the Union further agreed that: (1) the Hostess/Wonder Bread contract would govern

the future relationship between the Union and the Employer; (2) the Dolly Madison contract would be allowed to expire; (3) all employees covered by the Dolly Madison contract would be dovetailed according to unit seniority with the employees covered by the Hostess/Wonder Bread contract; and (4) the Employer would eliminate one of its delivery routes in Ponca City, Oklahoma.

Mr. Rammage had been a Dolly Madison sales representative in Ponca City for fifteen years prior to the Employer's consolidation of its distribution operations. He had never been represented by the Union, however, and he was not included in either the Dolly Madison or Hostess/Wonder Bread bargaining units. When the Employer informed the Union of Mr. Rammage's employment and that he was not associated with either bargaining unit, both the Employer and the Union agreed that he should become part of the consolidated unit under the Hostess/Wonder Bread agreement.

Apparently, however, they disagreed about Mr. Rammage's seniority. Mr. Rammage had worked for the Employer longer than any other sales representative in Ponca City, and the Employer considered him to be its best Ponca City employee. Therefore, the Employer sought to dovetail Mr. Rammage in the consolidated unit according to his years of employment rather than his years of participation in the Union. The Union countered that it would breach its duty of fair representation to the employees who were already in one of its two

separate bargaining units if it agreed to give Mr. Rammage the seniority the Employer sought for him. Accordingly, the Union insisted that Mr. Rammage be endtailed at the bottom of the consolidated bargaining unit's seniority roster. Ultimately, the Employer acquiesced to the Union's position and endtailed Mr. Rammage.

Because Mr. Rammage's endtailing made him the Employer's least senior employee for route bidding purposes, when the Employer eliminated one of its Ponca City routes some time after its negotiations with the Union, the sales representative who had worked that route was given the option to "bump" Mr. Rammage, or in other words, take over his route. When that sales representative exercised his option, Mr. Rammage's superior, Rodney Roberts, informed him that he would lose his regular route. In a letter requested by Mr. Rammage, Mr. Roberts attributed Mr. Rammage's demotion to a Union/Employer agreement to use "Union Seniority for Route Bidding." Mr. Roberts also stated orally that Mr. Rammage had been demoted because he "was not in the union." Ultimately, the Employer offered Mr. Rammage a position in its Bartlesville, Oklahoma terminal. Additionally, one of Mr. Rammage's superiors, Kirk Summers, repeatedly warned him that he "would have to join the union." Mr. Summers also stated that Mr. Rammage was transferred "because he was not in the union." Mr. Rammage eventually accepted the Bartlesville position which requires him to make a daily commute of more than seventy miles in each direction.

Appendix A

B. Analysis

We apply a deferential standard of review to NLRB orders. *NLRB v. Velocity Exp., Inc.*, 434 F.3d 1198, 1201 (10th Cir. 2006). Under this standard, we will enforce NLRB orders if the agency's legal conclusions are reasonable and its factual findings are supported by substantial evidence in the administrative record. *Id.*

The NLRA generally recognizes an employee's right to freely participate or not participate in union or labor organization activities. 29 U.S.C. § 157. To provide meaningful protection of this right, the NLRA prohibits unions from "caus[ing] or attempt[ing] to cause an employer to discriminate against an employee" in regard to any term of employment in a way that would encourage or discourage union membership or participation. *Id.* § 158(b)(2). Indeed, the Supreme Court has determined that "[t]he policy of the [NLRA] is to insulate employees' jobs from their organizational rights" so that employees may "freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40, 74 S. Ct. 323, 98 L. Ed. 455 (1954). Moreover, "a loss of seniority requested by a union and enforced by an employer" may constitute "discrimination to encourage union membership." *NLRB v. Am. Can Co.*, 658 F.2d 746, 754 (10th Cir. 1981).

In this case, the NLRB concluded that "in the context of a unit merger, a union and an employer are

not lawfully permitted to dovetail the seniority of represented employees while endtailing previously unrepresented employees." This conclusion reflects a reasonable application of the NLRA and the legal principles articulated above. Indeed, the Union's insistence on Mr. Rammage's endtailing coupled with the Employer's acquiescence and its statements that Mr. Rammage was demoted because he was not in the Union reasonably suggest that the Union caused the Employer to discriminate against Mr. Rammage in a way that encourages Union participation.

Furthermore, the NLRB reasonably rejected the Union's defense that it was bound by its duty of fair representation to insist on Mr. Rammage's endtailing. As the NLRB pointed out, the Union clearly eschewed any duty to the Hostess/Wonder Bread unit when it agreed to dovetail the seniority of the Dolly Madison employees. Indeed, the integrity of the Hostess/Wonder Bread unit's seniority roster was no less compromised by dovetailing only the Dolly Madison employees than it would have been if Mr. Rammage were also dovetailed. In fact, in relation to the Hostess/Wonder Bread employees, the only discernable difference between the dovetailed Dolly Madison employees and the endtailed Mr. Rammage was that Mr. Rammage had not previously been represented by the Union. Accordingly, we find that the NLRB reasonably concluded that the Union's insistence on Mr. Rammage's endtailing and loss of seniority for route bidding purposes caused the Employer to discriminate against Mr. Rammage in a way that encouraged his union participation in violation of 29 U.S.C. § 158(b)(2).

III. CONCLUSION

It is permissible to conclude that 29 U.S.C. § 153(b) authorizes the NLRB to act through only two members under the present circumstances. Furthermore, the NLRB's decision in this case reflects a reasonable application of the law. Accordingly, we uphold the NLRB's authority to act in this case, AFFIRM its decision, and enter judgment enforcing its order in full.

APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED SEPTEMBER 25, 2008

Cases 17-CA-23404 and 17-CB-6146

Interstate Bakeries Corporation *and* Kirk Rammage
Teamsters Local Union No. 523, affiliated with
International Brotherhood of Teamsters[1] *and*
KirkRammage.

September 25, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On October 31, 2006, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel and the Charging Party each filed exceptions and supporting briefs. The Respondent Union filed an answering brief to the General Counsel's and the Charging Party's exceptions. The Respondent Employer filed an answering brief to the Charging Party's exceptions.[2]

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1. We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL-CIO effective July 25, 2005.

2. No exceptions were filed to the judge's finding that the Respondent Employer violated Sec. 8(a)(1) by advising Charging Party Kirk Rammage that he would have to join the Union as a condition of continued employment.

Appendix B

The National Labor Relations Board[3] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent Union and the Respondent Employer did not violate the Act by agreeing to endtail, rather than dovetail, the seniority of Charging Party Rammage, following a unit merger. For the following reasons, we disagree with the judge and find that the Respondent Employer violated Section 8(a)(3) and (1) and the Respondent Union violated Section 8(b)(1)(A) and 8(b)(2), as alleged.

I. Background

The Employer manufactures and distributes bakery products under various names, including Dolly Madison, Hostess, and Wonder Bread. Until late 2005, the Employer's sales routes were structured along product lines. Some of the route representatives were assigned

3. Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

to sell and deliver only Dolly Madison products, while others were assigned Hostess and Wonder Bread products. The Union has historically represented the Dolly Madison and the Wonder Bread/Hostess sales representatives in separate units with separate collective-bargaining agreements. The Dolly Madison contract, covering employees in Tulsa and Muskogee, Oklahoma, ran from July 7, 2002, through November 5, 2005. The Wonder Bread/Hostess contract, covering sales representatives in Tulsa, Bartlesville, Ponca City, Woodward, Stillwell, and Enid, Oklahoma, ran from August 19, 2001, through August 19, 2006.

Kirk Rammage, the Charging Party, has been a Dolly Madison sales representative for the Employer for about 15 years, beginning before the Employer purchased the Wonder Bread/Hostess product lines. Rammage was based in Ponca City, Oklahoma, where he originally worked by himself from a Dolly Madison warehouse. Then, after the Employer's 1996-1997[4] acquisition of Wonder Bread/Hostess, and for cost-saving reasons, Rammage was moved to the Wonder Bread/Hostess warehouse in Ponca City. Unlike the Ponca City Wonder Bread/Hostess sales representatives based at that facility, however, he continued delivering and selling only Dolly Madison products. Rammage was not included in either of the bargaining units. Rammage was considered by the Employer to be an unrepresented

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4. The judge inadvertently stated that the acquisition occurred in 1977.

employee, and he received company benefits rather than the benefits stipulated under either union contract.

Sometime before November 2005, the Employer decided to consolidate routes: all sales representatives would deliver and sell all products, and there would be no differentiation between Dolly Madison and Wonder Bread/Hostess routes. In early November 2005, Randy Campbell, the president of the Union, met with various representatives of the Employer, and they agreed that the Dolly Madison and Wonder Bread/Hostess units would be merged.[5] The Dolly Madison contract, which was set to expire, would not be renewed, and the employees covered by it would be dovetailed according to unit seniority with the Wonder Bread/Hostess sales representatives, whose contract would remain in effect as the sole contract.[6] In addition, the parties agreed that one Ponca City route would be eliminated.

During that discussion, Mike Stewart, one of the Employer's senior managers, informed the Union of Rammage's employment at Ponca City and that he had not been included in either unit. The Union was previously unaware of Rammage. The parties agreed that Rammage should be included in the merged unit,

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5. The Muskogee employees, part of the Dolly Madison unit, were to be transferred to a different unit and were no longer to be represented by the Union.

6. An employee's unit seniority under the Dolly Madison contract was based on his length of continuous service with the company.

and they discussed where he would be placed on the seniority roster.

Although Rammage had no unit seniority, he had the most company seniority of any sales representative based in Ponca City. The Employer considered him to be its best Ponca City employee and did not want to lose him. Accordingly, it proposed that Rammage be dovetailed into the merged unit according to his company seniority. Union President Campbell refused, stating that the Union's duty of fair representation to the employees it represented would be breached if the Union allowed that to occur. Campbell insisted that Rammage be placed at the bottom of the merged unit's seniority roster, beginning on the date he entered the unit. Ultimately, the Employer agreed.

Subsequently, Division Manager Rodney Roberts, Rammage's supervisor, informed him that the Employer and the Union had decided to use "union seniority" for route bidding and vacation scheduling. In mid-December 2005, Roberts told Rammage that the route of one of the Ponca City sales representatives, Terry Tyler, was to be eliminated and that Tyler had exercised his option to bump Rammage in accordance with "union seniority." As a result, Rammage would lose his regular route. Rammage asked Roberts to put that in writing, and Roberts did so, attributing Rammage's demotion to an agreement between the Employer and the Union to use "Union Security for Route Bidding." After Roberts handed Rammage the note, Rammage asked Roberts to explain "why they can do this to me," and Roberts

replied that it was because Rammage "was not in the Union." Rammage continued working in Ponca City until about January 12, 2006, when Sales Manager Kirk Summers gave Rammage the option of working as a sales representative out of the Bartlesville terminal if he wanted to have a job. Summers told Rammage that he was one of his best men and he did not want to lose him. Summers also repeatedly told Rammage during the conversation that he "would have to join the Union."[7] Rammage asked Summers, as he had asked Roberts, why this was happening to him, and Summers said it was because he was not in the Union. Rammage ultimately accepted the Bartlesville position, which required him to commute over 70 miles each way.

II. Judge's Decision And Exceptions

The judge found that the Respondent Employer violated Section 8(a)(1) of the Act by advising Rammage that he would have to join the Union as a condition of employment. No exceptions were filed to that finding.

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7. The contract contains a maintenance of membership provision, requiring that "all present employees who are members of the Local Union on the effective date of this Agreement shall remain members of the Local Union in good standing as a condition of employment . . . ." The contract also provides that "Each newly hired employee will be sent to the Union Office before starting work, for an identification card which will be issued by the Union without obligation on the part of said applicant." In short, Rammage was under no contractual obligation to join the Union.

The judge concluded, however, that neither the Respondent Employer nor the Respondent Union violated the Act by agreeing to endtail Rammage's seniority.

The judge relied on *Riser Foods, Inc.*, 309 NLRB 635 (1992). In that case, which involved the merger of two employers, the Board held that a union, having a duty of fair representation toward bargaining unit employees, did not violate the Act by dovetailing the seniority of employees it had represented in different units prior to the merger, but endtailing employees it had not formerly represented who became unit employees as a result of the merger. The Board found that the union had no duty of fair representation to those employees that it did not yet represent. The judge rejected the General Counsel's contention that *Riser* is inapplicable because it was a duty of fair representation case.

The judge declined to apply *Whiting Milk Corp.*, 145 NLRB 1035 (1964), enf. denied 342 F.2d 8 (1st Cir. 1965), on which the General Counsel and the Charging Party had relied. In that case, the Board held that it was unlawful in a unit merger situation to endtail employees who were not formerly represented by any union, while dovetailing employees represented in different units by the same local union. While acknowledging that *Whiting Milk* was "analogous if not identical" to the instant case, the judge asserted that the Board "seems" to have "obliquely" overruled *Whiting Milk* in *IATSE Local 659 (MPO-TV)*, 197

NLRB 1187, 1189 fn. 8 (1972), enfd. 477 F.2d 450 (D.C. Cir. 1973) mem., cert. denied 414 U.S. 1157 (1974). He further concluded that because the Board in *Riser* did not "distinguish or even mention *Whiting Milk*,"[8] the Board "prefers its more current *Riser* analysis" "to the extent the Board's holding in *Whiting Milk* is inconsistent with *Riser*." Applying *Riser*, the judge dismissed the endtailing complaint allegations against both the Respondent Union and the Respondent Employer.

In their exceptions, the General Counsel and the Charging Party contend, in essence, that *Whiting Milk* is controlling precedent and that it compels a finding that the Employer and the Union violated the Act by endtailing Rammage.

III. Analysis

As acknowledged by the judge, the facts in *Whiting Milk* are "analogous if not identical" to those here. The judge attempted to avoid the application of *Whiting Milk* by asserting that the case has been "obliquely" overruled in subsequent cases. The judge's assertion, however, is incorrect.

The Board twice explicitly reaffirmed *Whiting* after the court of appeals' denial of enforcement in that case and stated that it did not agree with the court.

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8. The judge in *Riser* extensively discussed and distinguished *Whiting*.

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Woodlawn Farm Dairy, 162 NLRB 48, 50 fn. 2 (1966) ("Although the United States Court of Appeals for the First Circuit refused to enforce the Board's Decision in *Whiting Milk Corporation,* . . . we respectfully adhere to the position stated in the Decision in that case.");[9] *MPO-TV,* supra, 197 NLRB at 1189 fn. 8 ("Although enforcement was denied in *Whiting,* we believe the rationale in *Hilton D. Wall*[10] to be correct, and we respectfully disagree with the court's rationale in *Whiting.*"). The fact that in reaffirming the Board's *Whiting Milk* decision, the Board in *MPO-TV* also referred, with approval, to *Hilton D. Wall,* does not, contrary to the judge's surmise, establish that *Wall* was intended to limit the holding of *Whiting Milk.*[11] In sum, *MPO-TV* cannot reasonably be read to limit *Whiting Milk.*

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9. In *Woodlawn,* the Board found unlawful a contract provision stating that, in the event the employer acquired a branch or plant, seniority of union members would be dovetailed and seniority of nonmembers would not.

10. *Teamsters Local 480 (Hilton D. Wall),* 167 NLRB 920 (1967), enfd. 409 F.2d 610 (6th Cir. 1969).

11. In *Hilton D. Wall,* the union's conduct in placing an employee at the bottom of its seniority list following a "merger" between two companies was found unlawful because it was based on the fact that the employee had not previously been represented by a labor organization. The judge in *Hilton D. Wall,* affirmed by the Board, acknowledged the existence of the First Circuit's decision in *Whiting Milk,* but expressly stated that he was following Board precedent.

Further, and contrary to the judge's analysis here, there is no indication that the Board in *Riser* implicitly overruled *Whiting Milk*. The Board itself in *Riser* did not mention *Whiting Milk*, but the judge in that case had discussed and distinguished it. The Board in *Riser* adopted (with bolstering) the judge's rationale, and nowhere in the judge's or the Board's rationale is there anything to suggest that *Whiting Milk* was overruled or limited. Thus, there is no basis for the judge's statement here that the Board "prefers" its *Riser* analysis to that of *Whiting Milk*.

In any event, *Riser* is distinguishable from this case. The legal issue there was whether the union breached its duty of fair representation. *Riser* held that no breach of the duty of fair representation occurred where, at the time the union took the position that the seniority of certain employees should be endtailed, those employees were not yet included in the bargaining unit and were not yet represented by the union. But there is no breach of the duty of fair representation allegation before us; that theory was specifically disavowed by the General Counsel here.[12] Rather, the General Counsel is proceeding on a *Whiting Milk* theory: that Rammage was unlawfully discriminated against solely on the basis of his prior lack of representation by the Union. As set forth above, *Whiting Milk* has not been overruled, and it remains the law.[13]

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12. GC Br. 23.

13. Member Liebman questions the *Whiting Milk* line of cases. She agrees, however, that it is controlling Board law on these facts.

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The judge's suggestion that the Union acted lawfully because it was concerned only about unit, rather than union, considerations is misplaced. At the time Rammage became a unit employee, there was no established combined unit to protect. In addition, the Union abandoned the principle of protecting the integrity of the Wonder Bread/Hostess unit when it agreed to dovetail the previously represented Dolly Madison employees. The only difference between Rammage and those Dolly Madison employees who were dovetailed was the fact that Rammage had not previously been represented by the Union. The Union admits that it treated Rammage differently and unfavorably because he was not previously represented. In addition, the comments of Respondent Employer's managers Roberts and Summers to Rammage, that he lost his seniority because "he was not in the Union," demonstrate that he was singled out because he had not previously been represented by a labor organization.

The Union was legitimately concerned about its duty to the employees it already represented. Nevertheless, *Whiting Milk* and *Hilton D. Wall* hold that, in the context of a unit merger, a union and an employer are not lawfully permitted to dovetail the seniority of represented employees while endtailing previously unrepresented employees. *Whiting Milk*, 145 NLRB at 1037; *Hilton D. Wall*, 167 NLRB at 920 fn. 1. Accordingly, we find that the Respondents violated the Act by agreeing to endtail Rammage on the unit seniority list, permitting Rammage to be bumped from his job at the Ponca City facility, and transferring

Rammage to a job at the Bartlesville facility, all because he was not previously represented by the Union.

AMENDED CONCLUSIONS OF LAW

1. The Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent Employer has violated Section 8(a)(1) by telling Charging Party Kirk Rammage that he would have to join the Union as a condition of continued employment and that he lost his seniority because he was not previously represented by the Respondent Union.

4. The Respondent Employer has violated Section 8(a)(3) and (1) by agreeing with the Respondent Union to endtail Charging Party Kirk Rammage on the unit seniority list, endtailing Rammage on the unit seniority list, permitting Rammage to be bumped from his job at the Ponca City facility, and transferring Rammage to a job at the Bartlesville facility, because he was not previously represented by the Union.

5. The Respondent Union has violated Section 8(b)(1)(A) and (2) by demanding that Respondent Employer endtail Rammage on the unit seniority list, agreeing with Interstate Bakeries Corporation to

discriminate against Kirk Rammage with respect to seniority, on the basis of his prior lack of membership in, or representation by, the Respondent Union, permitting Respondent Employer to endtail Rammage on the unit seniority list, permitting Rammage to be bumped from his job at the Ponca City facility, and permitting Rammage to be transferred to a job at the Bartlesville facility based on his placement on the unit seniority list.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent Employer and the Respondent Union violated Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2), respectively, we shall order the Respondents to cease and desist from such conduct and to take certain affirmative action designed to effectuate the purposes of the Act. We shall order the Respondents to credit Rammage with unit seniority based on the length of his employment with the Respondent Employer. The Respondent Employer shall be ordered to give Rammage the opportunity that he did not have when the units merged to bid on a route based on that seniority, and award Rammage the route to which he would have been entitled by his bid. The Respondent Union shall be ordered to notify Rammage and the Respondent Employer in writing that it has no objection to the dovetailing of Rammage's seniority based on the length of his employment with the

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Respondent Employer, to allowing Rammage to bid on a route based on that seniority, or to awarding Rammage the route to which he would have been entitled by his bid. We shall also order the Respondents, jointly and severally, to make Rammage whole for any losses suffered as a result of the discrimination against him. Backpay shall be computed in the manner prescribed in *F.W. Woolworth*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondents shall also be ordered to grant Rammage any other rights and privileges to which he would have been entitled absent the discrimination against him.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 16, 2010

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 08-9568 and 08–9577

TEAMSTERS LOCAL UNION NO. 523, affiliated with the International Brotherhood of Teamsters,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

KIRK RAMMAGE,

Intervenor.

ORDER

Before **TACHA, HOLLOWAY,** and **KELLY,** Circuit Judges.

Petitioner's petition for rehearing is denied.

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The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX D — RELEVANT STATUTE 29 U.S.C. § 153

TITLE 29—LABOR

CHAPTER 7—LABOR-MANAGEMENT RELATIONS

SUBCHAPTER II—NATIONAL LABOR RELATIONS

Sec. 153. National Labor Relations Board

(a) Creation, composition, appointment, and tenure; Chairman; removal of members.

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947, [29 U.S.C. 141 et seq.] is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal.

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

[Subparts (c) and (d) deleted.]

APPENDIX E — RELEVANT STATUTE 29 U.S.C. § 158

TITLE 29—LABOR

CHAPTER 7—LABOR-MANAGEMENT RELATIONS

SUBCHAPTER II—NATIONAL LABOR RELATIONS

Sec. 158. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

. . . (3) by discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization. . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [29 U.S.C. § 157];

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3). . . . 28 U.S.C. § 158.

[Remainder omitted.]